United States Department of Labor
Employees' Compensation Appeals Board

S.M., Appellant	)	
and	)	**Docket No. 14-1668**
	)	**Issued: May 1, 2015**
DEPARTMENT OF THE NAVY, NAVAL AIR WARFARE CENTER AIRCRAFT DIVISION, Lakehurst, NJ, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 28, 2014 appellant filed a timely appeal from a January 29, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has more than an eight percent binaural hearing loss, for which he received a schedule award.

On appeal, appellant contends that he was entitled to a greater award as he had submitted evidence of a greater hearing loss and evidence of tinnitus.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 25, 2007 appellant, then a general engineer, filed an occupational disease claim alleging that he suffered from hearing loss as a result of his federal employment. He noted that he worked for over 41 years in noisy industrial environments where he was exposed to excessive and painful noise from low flying aircraft and industrial departments. Appellant noted that his jobs required him to be in the shop areas for approximately six hours daily. He retired on October 31, 2007.

On May 1, 2008 OWCP accepted appellant's claim for binaural hearing loss.

OWCP referred appellant for a second opinion. In a March 24, 2010 medical opinion, Dr. Sean Smullen, a Board-certified otolaryngologist, opined that appellant's noise exposure during his federal employment and not his age was responsible for his hearing loss. He reviewed the results of an audiogram conducted in his office on that date and diagnosed sensorineural hearing loss due to appellant's federal employment. Dr. Smullen noted that he applied the standards provided by the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*[2] (A.M.A., *Guides*) and calculated a 13.1 percent left-sided hearing loss and 16.9 percent right-sided hearing loss, for a binaural hearing loss of 13.1 percent. The audiogram reflected the following decibel (dB) air losses at 500, 1,000, 2,000, and 3,000 hertz (Hz) for the right ear of 30, 35, 30, and 50 dB respectively, and for the left ear 30, 25, 30, and 30 Hz respectively. Dr. Smullen recommended bilateral hearing aids.

On June 7, 2010 an OWCP medical adviser reviewed Dr. Smullen's otologic examination and did not agree with the calculation for the left ear or binaural impairment. He made his calculations with regard to hearing impairment pursuant to the sixth edition of the A.M.A., *Guides*, as follows: using Dr. Smullen's test results for 500, 1,000, 2,000, 3,000 Hz of monaural hearing loss in the left ear of 30, 25, 30, and 30 dB respectively, the medical adviser added these totals together to equal 115.0 and divided this by 4 which resulted in an average hearing loss of 28.75. He then subtracted the fence of 25 dB to equal 3.75 and multiplied this by 1.5 resulting in a 5.625 monaural hearing loss to the left ear. The medical adviser then noted that there was no added rating for tinnitus, and, after rounding the figure up, concluded that appellant had a monaural hearing loss in his left ear of 5.63 percent.

With regard to the right ear, he noted test results for 500, 1,000, 2,000, and 3,000 Hz, of 30, 35, 30, and 50 dB. The medical adviser added these figures together which equaled 145.00 and then divided by 4 to determine that the average threshold for the 4 frequencies was 36.25 dB. He then reduced this amount by the threshold fence of 25 dB which resulted in 11.25, and then multiplied this by 1.5 to find the percent of monaural loss for the right ear was 16.875. The medical adviser added 0 for tinnitus and rounded the figure up to determine that appellant had a monaural hearing loss in his right ear of 16.88 percent. He then multiplied the lesser 5.63 hearing loss by 5 which equaled 28.15, added this figure to 16.88 loss for the right ear which resulted in a subtotal of 45.03. After dividing this figure by 6, the medical adviser determined that appellant's binaural hearing loss was 7.5 percent. He also recommended hearing aids.

[2] A.M.A., *Guides* (6th ed. 2009).

On August 15, 2011 a second OWCP medical adviser, using the same figures and calculations as the first OWCP medical adviser, came to the same result of 5.625 monaural hearing loss in the left ear, a 16.875 monaural hearing loss in the right ear, for a binaural hearing loss of 7.5 percent.

By decision dated September 27, 2011, OWCP awarded a 7.5 binaural hearing loss. For payment purposes, it rounded this schedule award up to eight percent.

On September 24, 2012 appellant, through counsel, requested reconsideration.

In a decision dated December 14, 2012, OWCP denied modification of its prior decision.

On November 23, 2013 appellant again requested reconsideration. Appellant noted that he was submitting a report from Dr. James A. Boozan, a Board-certified otolaryngologist, who had calculated a higher level of hearing loss and noted tinnitus and a report from Dr. William L. Medford, Jr., also a Board-certified otolaryngologist, with regard to his tinnitus. Appellant alleged that the issue of tinnitus was originally overlooked.

Dr. Medford's October 18, 2013 report noted that appellant was experiencing tinnitus in both ears which was constant. He noted that on a scale of 1 to10, appellant's left ear tinnitus is about a 4 to 5 and his right ear tinnitus is about a 6. Dr. Medford noted that the tinnitus was annoying and occasionally interfered with appellant's sleep. He noted that, pursuant to the A.M.A., *Guides*, it is appropriate to add up to five percent for tinnitus to increase an impairment rating. Dr. Medford opined that as appellant's binaural hearing impairment is 7.5 percent, with the additional 4 percent for tinnitus handicap, his binaural hearing rating became 11.5 percent. He also noted that, according to the sixth edition of the A.M.A., *Guides*, this will allow a whole person impairment of four percent.

Appellant also submitted a facsimile (fax) transmittal slip dated September 24, 2012 from the offices of Dr. Boozan which indicated that, due to Dr. Boozan's unexpected time away from the office, his report would not be completed until the following week when he returned.

In a decision dated January 29, 2014, OWCP denied modification. It determined that Dr. Medford only gave an impairment rating for tinnitus based on the whole person and OWCP does not approve schedule awards for whole body impairments.

LEGAL PRECEDENT

The schedule award provision of FECA[3] and its implementing regulations set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The

[3] 5 U.S.C. §§ 8101-8193.

A.M.A., *Guides* (6th ed. 2009), has been adopted by OWCP for evaluating schedule loss and the Board has concurred in such adoption.[4]

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides.* Using the frequencies of 500, 1,000, 2,000, and 3,000 cycles per second, the losses at each frequency are added up and averaged. Then, the fence of 25 decibels is deducted because, as the A.M.A., *Guides* points out, losses below 25 decibels result in no impairment in the ability to hear everyday speech under everyday conditions.[5] The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss. The binaural loss is determined by calculating the loss in each ear using the formula for monaural loss; the lesser loss is multiplied by five and then added to the greater loss and the total is divided by six to arrive at the amount of the binaural hearing loss. The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.[6] The Board has also noted OWCP's policy to round the calculated percentage of impairment to the nearest whole number.[7]

If tinnitus interferes with activities of daily living, including sleep, reading and other tasks requiring concentration, enjoyment of quiet recreation and emotional well-being, up to five percent may be added to a measurable binaural hearing impairment.[8]

ANALYSIS

OWCP accepted appellant's claim for binaural hearing loss. It referred appellant to Dr. Smullen for a second opinion evaluation and a determination of the amount of appellant's hearing loss. Dr. Smullen, in his March 24, 2010 opinion, applied the formula set forth in the sixth edition of the A.M.A., *Guides* and that appellant had a 13.1 percent left-sided hearing loss, a 16.9 percent right-sided hearing loss, and a binaural hearing loss of 13.1 percent. He did not provide his calculations with regard to how he arrived at these figures.

OWCP then forwarded Dr. Smullen's report to an OWCP medical adviser. The medical adviser evaluated appellant's claim and provided calculations in support of the conclusion. The medical adviser utilized the results of the audiogram conducted for Dr. Smullen. The medical adviser concluded that Dr. Smullen had not appropriately calculated the hearing impairment in appellant's left ear. Using Dr. Smullen's test results for 500, 1,000, 2,000, and 3,000 Hz for monaural hearing loss in the left ear of 30, 25, 30, and 30 dB respectively, these totals were added together to equal 115.0 and divided this by 4 which resulted in an average hearing loss of 28.75. The fence of 25 dB was subtracted to equal 3.75. This was multiplied by 1.5 resulting in

[4] *R.D.*, 59 ECAB 127 (2007); *Bernard Babcock, Jr.*, 52 ECAB 143 (2000); *see also* 20 C.F.R. § 10.404.

[5] *See* A.M.A., *Guides* 250.

[6] *E.S.*, 59 ECAB 249 (2007); *Reynaldo R. Lichetenberger*, 52 ECAB 462 (2001).

[7] *J.H.*, Docket No. 08-2432 (issued June 15, 2009); *Robert E. Cullison*, 55 ECAB 570 (2004). *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4(b)(2)(b) (September 2010).

[8] A.M.A., *Guides* 249.

a 5.625 monaural hearing loss to the left ear. The medical adviser found monaural hearing loss in his left ear of 5.63 percent.

With regard to the right ear, using the test results for 500, 1,000, 2,000, and 3,000 Hz, of 30, 35, 30, and 50 dB, these figures were added together to equal 145.00 and then divided by 4 to determine that the average threshold for the 4 frequencies was 36.25 dB. This amount was then reduced by the threshold fence of 25 dB which resulted in 11.25, and then multiplied this by 1.5 to find the percent of monaural loss for the right ear was 16.875. No percentage was added for tinnitus. The figure was rounded up to determine that appellant had a monaural hearing loss in his right ear of 16.88 percent. The medical adviser then multiplied the lesser 5.63 hearing loss by 5 which equaled 28.15, added this figure to 16.88 loss for the right ear which resulted in a subtotal of 45.03. After dividing this figure by 6, appellant's binaural hearing loss was determined to be 7.5 percent. A second medical adviser concurred with these results.

The Board finds that Dr. Smullen properly explained how he calculated hearing impairment. The medical advisers utilized those findings and properly applied the A.M.A., *Guides* to arrive at the 7.5 percent binaural hearing loss. The Board finds that their reports were thorough, detailed and properly applied the A.M.A., *Guides*.[9] Although appellant contends that Dr. Boozan found a greater decibel hearing loss, he failed to provide a medical opinion to support this assertion.

Subsequent to the review of this case by the medical advisers, appellant submitted a report wherein Dr. Medford opined that appellant was entitled to four percent added to his impairment rating for binaural hearing loss due to tinnitus. Although Dr. Medford did address appellant's whole person impairment, he also clearly indicated that appellant had an 11.5 percent binaural hearing impairment, after adding 4 percent for tinnitus. The Board notes that regarding tinnitus, the A.M.A., *Guides* provides that tinnitus in the presence of unilateral or bilateral hearing impairment may impair speech discrimination. Therefore, up to five percent may be added for tinnitus in the presence of measurable hearing loss if the tinnitus impacts the ability to perform activities of daily living.[10]

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[11] The Board finds that the case is not in posture for decision regarding the award or extent of tinnitus. Consequently, while the medical evidence from Dr. Medford in his October 18, 2013 report is insufficiently rationalized to meet his burden of proof to establish that he is entitled to an

[9] FECA procedures relating to the evaluation of schedule awards state that the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percent of impairment. FECA Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.e (February 2013).

[10] *See D.W.*, Docket No.14-931 (issued August 11, 2014).

[11] *Phillip L. Barnes*, 55 ECAB 426 (2004).

increased schedule award due to tinnitus, it is sufficient to require further development by OWCP.[12]

Accordingly, the Board will remand the case to OWCP. On remand, it should further develop the medical record to determine whether appellant is entitled to an increased schedule award due to tinnitus. Following this and such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 29, 2014 is set aside and the case remanded for further development consistent with the above opinion.

Issued: May 1, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

[12] *E.J.*, Docket No. 09-1481 (issued February 19, 2010).